

Date Issued: April 30, 1982 (AGO 82-35)

Requested by: James T. Odegard, Grand Forks County States Attorney

- QUESTIONS PRESENTED -

I.

Whether deputies or special officers are acting in the course and scope of their employment with the county when policing public dances, music festivals, or concerts pursuant to section 53-02-08 of the North Dakota Century Code.

II.

Whether deputies or special officers are acting in the course and scope of their employment with the county when they are paid directly by the person conducting such dance, festival, or concert rather than by the county.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that deputies or special officers are acting in the course and scope of their employment with the county when policing public dances, music festivals, or concerts pursuant to section 53-02-08, N.D.C.C.

II.

It is my further opinion that deputies or special officers are acting in the course and scope of their employment with the county when they are paid directly by the person conducting such dance, festival, or concert.

- ANALYSIS -

I.

Section 65-01-03, N.D.C.C., provides:

65-01-03. PERSON PERFORMING SERVICE FOR REMUNERATION PRESUMED AN EMPLOYEE. Each person who performs services for another for a remuneration, whether the same is paid as a salary, commission, or other considerations in lieu thereof, under any agreement or contract of hire, express or implied, shall be presumed to be an employee of the person for whom the services are performed, unless he shall maintain a separate business establishment or shall hold himself out to or shall render services to the general public.

In determining whether a person is an independent contractor or employee, the primary test to be employed is the "right to control" test.

Because section 53-02-08, N.D.C.C., provides that it is the sheriff's duty to police public dances, music festivals, and public concerts, it is apparent that the service provided by a deputy or special officer is provided on behalf of the sheriff pursuant to statute.

Furthermore, as provided in section 53-02-08, N.D.C.C., the "right to control" test is the primary test to be utilized in determining whether a person is an independent contractor or an employee. Among the elements which compose the right to control test are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire. (1C Larson's Workmen's Compensation Law, section 44.10, 8-31.)

Section 53-02-08, N.D.C.C., responds directly to several elements of the "right to control" test. It requires that the sheriff is to determine the number of deputies or special officers needed to police the events. Presumably, therefore, the sheriff must also direct those deputies or special officers as to what to do and how to do it. The sheriff, then, by statute and in practice, must exercise control.

That same section also provides that payment is to be made to the sheriff. If the person conducting the dance, festival, or concert pays the deputy or special officer directly, that does not negate the explicit language or obvious intent of section 53-02-08, N.D.C.C. The law contemplates that ultimate responsibility for providing such deputies or special officers and for securing payment to them lies with the sheriff.

Presumably, the sheriff provides such deputies or special officers with whatever equipment they need to do their job, such as badges, weapons, and vehicles. Finally, because the sheriff has the right to hire, presumably, he has the right to fire such deputies or special officers.

## II.

Pursuant to section 53-02-08, N.D.C.C., these deputies or special officers are employees of the sheriff and are to be paid by the sheriff. If other arrangements are made for payment, it is my opinion that the sheriff is responsible for accounting for those payments, reporting them to the North Dakota Workmen's Compensation Bureau for premium purposes, and seeing to it that premiums are paid by the county to the Bureau for such deputies or special officers. The source of the payment under these circumstances has no effect on whether the deputies or special officers are acting in the course and scope of their employment.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the action of public officials until such time as the questions presented are decided by the courts.

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Attorney General

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